

**Introduced by Senator Torlakson**

February 17, 2005

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An act to add and repeal Article 6.9 (commencing with Section 20209.20) of Chapter 1 of Part 3 of Division 2 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 371, as amended, Torlakson. Public contracts: design-build contracting: transportation entities.

(1) Existing law sets forth requirements for the solicitation and evaluation of bids and the awarding of contracts by public entities for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law also authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis. Existing law, until January 1, 2007, authorizes transit operators to enter into a design-build contract, as defined, according to specified procedures.

This bill would authorize, until January 1, 2011, certain state and local transportation entities to use a design-build process for bidding on highway construction projects, as specified. This bill would establish a procedure for submitting bids that includes a requirement that design-build entity bidders provide certain information in a questionnaire submitted to the transportation entity that is verified under oath. Because a verification under oath is made under penalty of perjury, the bill would, by requiring a verification, create a new crime and thereby impose a state-mandated local program. The bill would require these transportation entities to report to the Legislature regarding implementation of the design-build process.

(2) This bill would require the ~~Bureau of State Audits~~ *Legislative Analyst* to conduct a preproject and postproject audit of each project and to compare them to similar design-bid-build or design sequencing projects and report the results to the Legislature, as provided.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Article 6.9 (commencing with Section  
2 20209.20) is added to Chapter 1 of Part 3 of Division 2 of the  
3 Public Contract Code, to read:

4  
5 Article 6.9. Transportation Design-Build Contracts

6  
7 20209.20. The Legislature finds and declares all of the  
8 following:

9 (a) It is the intent of the Legislature, in enacting this article, to:  
10 (1) Demonstrate an alternative and optional procedure for  
11 bidding on highway, bridge, tunnel, or public transit construction  
12 projects in the jurisdiction of any county, any local transportation  
13 authority designated pursuant to Division 19 (commencing with  
14 Section 180000) of the Public Utilities Code, or any local or  
15 regional transportation entity that is designated by statute as a  
16 regional transportation agency.

17 (2) Authorize the Department of Transportation to  
18 demonstrate an alternative bidding procedure for highway,  
19 bridge, or tunnel projects on the state highway system.

20 (b) (1) Transportation entities should be able to utilize  
21 cost-effective options for delivery of highway projects, in  
22 accordance with the national trend, that includes authorizing  
23 public entities to utilize design-build contracts as a project  
24 delivery method.

1 (2) Utilizing a design-build contract requires a clear  
2 understanding of the roles and responsibilities of each participant  
3 in the design-build process. The benefits of a design-build  
4 contract project delivery system include an accelerated  
5 completion of the projects, cost containment, reduction of  
6 construction complexity, and reduced exposure to risk for the  
7 transportation entity.

8 (3) This approach toward the design-build project delivery  
9 method should be evaluated for the purposes of exploring the  
10 potential for reduced project costs, expedited project completion,  
11 or design features not achievable through the design-bid-build  
12 method.

13 (c) For the purposes of this demonstration, it is important to  
14 select projects for which funding has been identified or  
15 programmed and are ready or are near ready for construction. It  
16 is also important to select projects that range in cost for the  
17 demonstration program.

18 (d) These projects are subject to the existing process under the  
19 state transportation improvement program (Chapter 2  
20 (commencing with Section 14520) of Part 5.3 of Division 3 of  
21 the Government Code) for planning, programming,  
22 environmental clearance, and funding. Projects that are  
23 ultimately chosen for demonstration of the design-build  
24 collaboration project delivery method under this article shall  
25 comply with all existing requirements under the state  
26 transportation improvement program for project development  
27 and funding. This article does not confer any type of competitive  
28 advantage upon the projects in this article, relative to other  
29 projects subject to the state transportation improvement program,  
30 during other phases of project development.

31 20209.22. For the purposes of this article, the following  
32 definitions apply:

33 (a) “Best value” means a value determined by objective  
34 criteria, including, but not limited to, price, features, functions,  
35 life cycle costs, and other criteria deemed appropriate by the  
36 transportation entity.

37 (b) “Design-build” means a procurement process in which  
38 both the design and construction of a project are procured from a  
39 single entity.

1 (c) “Design-build entity” means a partnership, corporation, or  
2 other legal entity that is able to provide appropriately licensed  
3 contracting, architectural, and engineering services as needed  
4 pursuant to a design-build contract.

5 (d) “Department” means the Department of Transportation as  
6 established under Part 5 (commencing with Section 14000) of  
7 Division 3 of the Government Code.

8 (e) “Local transportation entity” means a transportation  
9 authority designated pursuant to Division 19 (commencing with  
10 Section 180000) of the Public Utilities Code and any other local  
11 or regional transportation entity that is designated by statute as a  
12 regional transportation agency.

13 (f) “Transportation entity” means the department and a local  
14 transportation entity.

15 20209.23. (a) A local transportation entity may utilize the  
16 design-build method of procurement for highway, bridge, tunnel,  
17 or public transit projects within the jurisdiction of the entity.

18 (b) The department may utilize the design-build method of  
19 procurement for highway, bridge, or tunnel projects.

20 20209.24. A transportation entity shall implement for  
21 design-build projects a labor compliance program as described in  
22 Section 1771.5 of the Labor Code, or it shall contract with a third  
23 party to implement on the entity’s behalf a labor compliance  
24 program described in that statute. This requirement does not  
25 apply to any project where the transportation entity or the  
26 design-build entity has entered into any collective bargaining  
27 agreement or agreements that bind all of the contractors  
28 performing work on the projects.

29 20209.26. Bidding for design-build projects shall progress as  
30 follows:

31 (a) The transportation entity shall prepare a set of documents  
32 setting forth the scope of the project. The documents may  
33 include, but need not be limited to, the size, type, and desired  
34 design character of the project, performance specifications  
35 covering the quality of materials, equipment, and workmanship,  
36 preliminary plans, and any other information deemed necessary  
37 to describe adequately the transportation entity’s needs. The  
38 performance specifications and any plans shall be prepared by a  
39 design professional who is duly licensed and registered in  
40 California.

(b) Based on the documents prepared under subdivision (a), the transportation entity shall prepare a request for proposals that invites interested parties to submit competitive sealed proposals in the manner prescribed by the transportation entity. The request for proposals shall include, but need not be limited to, the following elements:

(1) Identification of the basic scope and needs of the project or contract, the expected cost range, the methodology that will be used by the transportation entity to evaluate proposals, whether the contract will be awarded to the lowest responsible bidder, and any other information deemed necessary by the transportation entity to inform interested parties of the contracting opportunity.

(2) Significant factors that the transportation entity reasonably expects to consider in evaluating proposals, including, but not limited to, cost or price and all nonprice related factors.

(3) The relative importance of the weight assigned to each of the factors identified in the request for proposals.

(4) If a nonweighted system is used, the transportation entity shall specifically disclose whether all evaluation factors other than cost or price when combined are any of the following:

(A) Significantly more important than cost or price.

(B) Approximately equal in importance to cost or price.

(C) Significantly less important than cost or price.

(5) If the transportation entity reserves the right to hold discussions or negotiations with responsive bidders, it shall so specify in the request for proposals and shall publish separately or incorporate into the request for proposals applicable rules and procedures to be observed by the transportation entity to ensure that any discussions or negotiations are conducted in good faith.

(c) (1) The transportation entity shall establish a procedure to prequalify design-build entities using a standard questionnaire prepared by the transportation entity. In preparing the questionnaire, the transportation entity shall consult with the construction industry, including, but not limited to, representatives of the building trades and surety industry. This questionnaire shall require information including, but not limited to, all of the following:

(A) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners,

1 general partners, or association members known at the time of  
2 bid submission who will participate in the design-build contract.

3 (B) (i) Evidence that the lead member of the design-build  
4 entity has completed a state highway project in California with a  
5 value of at least fifty million dollars (\$50,000,000) in the past 10  
6 years.

7 (ii) Evidence that the members of the design-build entity have  
8 completed, or demonstrated the experience, competency,  
9 capability, and capacity to complete projects of similar size,  
10 scope, or complexity, and that proposed key personnel have  
11 sufficient experience and training to competently manage and  
12 complete the design and construction of the project, and a  
13 financial statement that assures the transportation entity that the  
14 design-build entity has the capacity to complete the project.

15 (C) The licenses, registration, and credentials required to  
16 design and construct the project, including, but not limited to,  
17 information on the revocation or suspension of any license,  
18 credential, or registration.

19 (D) Evidence that establishes that the design-build entity has  
20 the capacity to obtain all required payment and performance  
21 bonding, liability insurance, and errors and omissions insurance.

22 (E) Information concerning workers' compensation experience  
23 history and a worker safety program.

24 (F) A full disclosure regarding all of the following that are  
25 applicable:

26 (i) Any serious or willful violation of Part 1 (commencing  
27 with Section 6300) of Division 5 of the Labor Code or the federal  
28 Occupational Safety and Health Act of 1970 (Public Law  
29 91-596), settled against any member of the design-build entity.

30 (ii) Any debarment, disqualification, or removal from a  
31 federal, state, or local government public works project.

32 (iii) Any instance where the design-build entity, or its owners,  
33 officers, or managing employees submitted a bid on a public  
34 works project and were found to be nonresponsive, or were found  
35 by an awarding body not to be a responsible bidder.

36 (iv) Any instance where the design-build entity, or its owners,  
37 officers, or managing employees defaulted on a construction  
38 contract.

39 (v) Any violations of the Contractors' State License Law, as  
40 described in Chapter 9 (commencing with Section 7000) of

1 Division 3 of the Business and Professions Code, excluding  
2 alleged violations of federal or state law regarding the payment  
3 of wages, benefits, apprenticeship requirements, or personal  
4 income tax withholding, or Federal Insurance Contribution Act  
5 (FICA) withholding requirements settled against any member of  
6 the design-build entity.

7 (vi) Any bankruptcy or receivership of any member of the  
8 design-build entity, including, but not limited to, information  
9 concerning any work completed by a surety.

10 (vii) Any settled adverse claims, disputes, or lawsuits between  
11 the owner of a public works project and any member of the  
12 design-build entity during the five years preceding submission of  
13 a bid under this article, in which the claim, settlement, or  
14 judgment exceeds fifty thousand dollars (\$50,000). Information  
15 shall also be provided concerning any work completed by a  
16 surety during this five-year period.

17 (G) In the case of a partnership or any association that is not a  
18 legal entity, a copy of the agreement creating the partnership or  
19 association that specifies that all partners or association members  
20 agree to be fully liable for the performance under the  
21 design-build contract.

22 (2) The information required under this subdivision shall be  
23 verified under oath by the design-build entity and its members in  
24 the manner in which civil pleadings in civil actions are verified.  
25 Information required under this subdivision that is not a public  
26 record under the California Public Records Act, as described in  
27 Chapter 3.5 (commencing with Section 6250) of Division 7 of  
28 Title 1 of the Government Code, shall not be open to public  
29 inspection.

30 (d) The transportation entity shall establish a procedure for  
31 final selection of the design-build entity. Selection shall be based  
32 on either of the following criteria:

33 (1) A competitive bidding process resulting in lump-sum bids  
34 by the prequalified design-build entities. Awards shall be made  
35 to the lowest responsible bidder.

36 (2) A design-build competition based upon best value and  
37 other criteria set forth in subdivision (b). The design-build  
38 competition shall include the following elements:

39 (A) Competitive proposals shall be evaluated by using only  
40 the criteria and selection procedures specifically identified in the

request for proposal. However, the following minimum factors shall each represent at least 10 percent of the total weight of consideration given to all criteria factors:

- (i) Price.
- (ii) Technical design and construction expertise.
- (iii) Life cycle costs over 15 years or more.
- (iv) Skilled labor force availability, determined by the existence of an agreement with a registered apprenticeship program, which program has been approved by the California Apprenticeship Council.
- (v) An acceptable safety record. A bidder's safety record shall be deemed acceptable if its experience modification rate for the most recent three-year period is an average of 1.00 or less, and its average total recordable injury/illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category or if the bidder is a party to an alternative dispute resolution system as provided for in Section 3201.5 of the Labor Code.

(B) When the evaluation is complete, the top three responsive bidders shall be ranked sequentially from the most advantageous to the least advantageous.

(C) The award of the contract shall be made to the responsible bidder whose proposal is determined to be the most advantageous.

(D) Notwithstanding any other provision of this code, upon issuance of a contract award, the transportation entity shall publicly announce its award, identifying the contractor to whom the award is made, along with a written decision supporting its contract award and stating the basis of the award. The notice of award shall also include the transportation entity's second and third ranked design-build entities.

(E) The written decision supporting the transportation entity's contract award, described in subparagraph (D), and the contract file shall provide sufficient information to satisfy an external audit.

20209.27. (a) A firm that is hired or paid by a transportation entity to perform prebid services for a project shall not bid or join with another company to bid for that project's design-build contract.



1 (b) For purposes of this article, prebid services include  
2 preliminary engineering studies and other activities that lead to  
3 the selection of a project alternative. These activities include, but  
4 are not limited to, the following:

- 5 (1) Project geometric design.
- 6 (2) Earthwork calculations.
- 7 (3) Preparation of cross sections.
- 8 (4) Drainage design.
- 9 (5) Construction staging design.

10 20209.28. (a) Any design-build entity that is selected to  
11 design and build a project under this article shall possess or  
12 obtain sufficient bonding to cover the contract amount for  
13 nondesign services, and errors and omission insurance coverage  
14 sufficient to cover all design, engineering, and architectural  
15 services provided in the contract. This section does not prohibit a  
16 general or engineering contractor from being designated the lead  
17 entity on a design-build project for the purposes of purchasing  
18 necessary bonding to cover the activities of the design-build  
19 entity.

20 (b) Any payment or performance bond written for the  
21 purposes of this article shall be written using a bond form  
22 developed by the Department of General Services under  
23 subdivision (g) of Section 14661 of the Government Code.

24 20209.30. All bids by subcontractors bidding on contracts  
25 under this article shall be subject to Chapter 4 (commencing with  
26 Section 4100) of Part 1 of Division 2. The design-build entity  
27 shall do both of the following:

28 (a) Provide public notice of the availability of work to be  
29 subcontracted in accordance with the publication requirements  
30 applicable to the competitive bidding process of the  
31 transportation entity.

32 (b) Provide a fixed date and time on which the subcontracted  
33 work will be awarded, which awards shall be made in accordance  
34 with the procedure established under this article for awarding a  
35 design-build contract.

36 20209.32. A deviation from the performance criteria and  
37 standards established under subdivision (a) of Section 20209.26  
38 shall not be authorized except by written consent of the  
39 transportation entity.

1 20209.34. (a) A local transportation entity shall consult with  
2 the department in identifying projects to be performed on the  
3 state highway system.

4 (b) The department shall establish the parameters for the  
5 extent of the participation of its employees under this article.

6 20209.36. Quality control inspection for the construction of  
7 any project utilizing the design-build method of procurement  
8 authorized by this article may not be performed by the  
9 design-build contractor for the project.

10 20209.38. Nothing in this article affects, expands, alters, or  
11 limits any rights or remedies otherwise available at law.

12 20209.40. (a) The retention proceeds withheld by a  
13 transportation entity from a design-build entity shall not exceed 5  
14 percent.

15 (b) The transportation entity shall not withhold retention from  
16 payments to a design-build entity for actual costs incurred and  
17 billed or design services, construction management services, or  
18 where applicable, for completed operations and maintenance  
19 services.

20 (c) In a contract between a design-build entity and a  
21 subcontractor, and in a contract between a subcontractor and any  
22 subcontractor thereunder, the percentage of the retention  
23 proceeds withheld shall not exceed the percentage specified in  
24 the contract between the transportation entity and the  
25 design-build entity. If the design-build entity provides written  
26 notice to any subcontractor who is not a member of the  
27 design-build entity, prior to or at the time that the bid is  
28 requested, that a bond may be required and the subcontractor  
29 subsequently is unable or refuses to furnish a bond to the  
30 design-build entity, then the design-build entity may withhold  
31 retention proceeds in excess of the percentage specified in the  
32 contract between the transportation entity and the design-build  
33 entity from any payment made by the design-build entity to the  
34 subcontractor.

35 (d) In accordance with applicable state law, the design-build  
36 entity may be permitted to substitute securities in lieu of the  
37 withholding from progress payments specified in subdivision (b).  
38 These substitutions shall be made in accordance with Section  
39 22300.

1 20209.42. Not later than three years after the design-build  
2 contract is awarded, the transportation entity shall submit a  
3 progress report to the Senate Committee on Transportation, and  
4 the Assembly Committee on Transportation. The progress report  
5 shall include, but shall not be limited to, all of the following  
6 information:

- 7 (a) A description of the project.
- 8 (b) The estimated and actual project costs.
- 9 (c) The design-build entity that was awarded the project.
- 10 (d) A description of any written protests concerning any aspect  
11 of the solicitation, bid, proposal, or award of the design-build  
12 project, including, but not limited to, the resolution of the  
13 protests.
- 14 (e) An assessment of the prequalification process and criteria.
- 15 (f) An assessment of the impact of limiting retention to 5  
16 percent on the project, as required under Section 20209.40.
- 17 (g) A description of the labor compliance program required  
18 under Section 20209.24 and an assessment of the impact of this  
19 requirement on a project.
- 20 (h) A description of the method used to award the contract. If  
21 best value was the method, the factors used to evaluate the bid  
22 shall be described, including the weighting of each factor and an  
23 assessment of the effectiveness of the methodology.
- 24 (i) An assessment of the impact that the “skilled labor force  
25 availability” requirement imposed under clause (iv) of  
26 subparagraph (A) of paragraph (2) of subdivision (d) of Section  
27 20209.26 has had on the project.
- 28 (j) Recommendations regarding the most appropriate uses for  
29 the design-build method of procurement.

30 20209.44. This article shall remain in effect only until  
31 January 1, 2011, and as of that date is repealed.

32 ~~SEC. 2. The Bureau of State Audits~~ *Legislative Analyst* shall  
33 conduct a preproject and postproject audit of each project and  
34 compare them to similar design-bid-build or design sequencing  
35 projects and report the results to the Legislature. ~~The bureau~~  
36 *Legislative Analyst* shall deliver each final report on a project to  
37 the Legislature after the project has been in operation for five  
38 years.

39 SEC. 3. No reimbursement is required by this act pursuant to  
40 Section 6 of Article XIII B of the California Constitution because

1 the only costs that may be incurred by a local agency or school  
2 district will be incurred because this act creates a new crime or  
3 infraction, eliminates a crime or infraction, or changes the  
4 penalty for a crime or infraction, within the meaning of Section  
5 17556 of the Government Code, or changes the definition of a  
6 crime within the meaning of Section 6 of Article XIII B of the  
7 California Constitution.

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